Supreme Court, U.S.
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02-1624

In the
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT and
DAVID W. GORDON, SUPERINTENDENT, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF ROB SHERMAN ADVOCACY IN SUPPORT OF RESPONDENTS

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Question Presented

Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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Interest of the Amicus

Robert I. Sherman and Richard H. Sherman were the Plaintiffs in the Illinois Pledge of Allegiance case that was decided by the Seventh Circuit in 1992, *Sherman v. Community Consolidated School District 21,* 980 F. 2d 437 (7th Cir.1992).

Robert I. Sherman is a leading expert on atheist civil rights and one of the most successful and effective atheist civil rights activists in America today. He has won dozens of state/church separation battles in the past twenty years.

Richard H. Sherman, who was in First Grade when the Illinois Pledge case was filed, is now a Senior at the University of Wisconsin in Madison, where he is studying to be a public high school science teacher. The decision of this Honorable Court in the Newdow case will have a direct and significant impact on Richard when he becomes a public school teacher next year, as well as on all public school teachers who are atheists.

Rob Sherman Advocacy is a national social justice organization. The organization and its predecessor organizations have taken on a variety of social justice issues for the past twenty years.

Summary of the Argument

Public elementary school pupils are not willing participants in a Pledge of Allegiance ceremony which includes the words, "under God," due to the schoolhouse setting.

Argument

The Pledge Ceremony Containing "Under God" Violates The Establishment Clause Because of the Schoolhouse Setting

The main issue confronting the Court in this case is the constitutionality of a state-led group exercise involving young children when that exercise includes the words, "under God." If there is anything that has been consistent about this Court's Establishment Clause rulings, it is the Court's commitment to heightened scrutiny in the public school setting. To wit:

> "[This] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [citations omitted]...
>
> The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [citations omitted]...
>
> Furthermore, "[t]he public school is at once the symbol of our democracy and the most

> pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools ...", *citing, McCollum v. Board of Education*, 333 U.S. 203, 231 (1948).
>
> Consequently, the court has been required often to invalidate statutes which advance religion in public elementary and secondary schools."

Edwards v. Aguillard, 482 U.S. 578, 584-85 (1987).

In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court began its analysis with the acknowledgment that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools [citations omitted]". 505 US at 592, 120 L.Ed.2d at 484. The Court found that school control of the graduation ceremony placed public pressure, as well as peer pressure, on the attending students to participate or maintain respectful silence. Id. at 484. This pressure, the Court held, "though subtle and indirect can be as real as any overt compulsion." Id. at 484. Thus, the real question is whether, in an elementary school setting, there is such a thing as a truly "willing" student participant. The inherent susceptibility of school-age children to the subtle, but real, pressure to conform or face consequences such as ridicule or ostracism is the underlying tenet of this Court's historic sensitivity to Establishment Clause violations involving the education of children.

In *Lee, supra*, this Court concluded that a state-controlled high school graduation ceremony involving references to a deity was constitutionally intolerable. With how much more force, then, do the considerations that dictated the result in *Lee* apply here,

when the students involved here are much younger than those in *Lee*? Here, fifth graders were put to the choice of resisting the considerable social and peer pressure to participate in a group exercise (standing with hand over heart and saying the Pledge) or "giving in" and reciting a slogan (One Nation Under God") which may be anathema to the religious beliefs of either the student and/or parent. The choice is every bit as unacceptable in this case as it was in *Lee*, perhaps more so, in light of the very tender years of the minor child of the Petitioner.

It should not matter that the group activity was denominated a "prayer" in *Lee* whereas here it is "only" the Pledge. A slogan repugnant to one's religious beliefs that one is forced to utter or be ostracized is no more palatable if buried in a patriotic exercise than it is in a formal prayer. Moreover, the Establishment Clause reaches beyond state sponsorship of "prayer." In *Grand Rapids School District v. Ball*, 473 U.S. 373, 389 (1985) (rev'd on other grounds *Agostini v. Felton*, 521 U.S. 203, 235 (1997)), this Court declared that:

> "Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any – or all – religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated."

What is the Pledge but a grand declaration that this Nation, the flag and patriotism are all inextricably intertwined with the belief in a monotheistic deity? It is simply disingenuous to suggest that no one is harmed because, after all, it is "only" the benign and "patriotic" Pledge of Allegiance. Such an attitude insults the theological scruples of potential student objectors, their parents and those who added the words, "under God," to the Pledge. There is no reason to believe that the Pledge does not mean what it says at this time in our history when one's belief in a deity or lack thereof is a significant issue regarding one's standing in the community. Forty years of this Court's Establishment Clause jurisprudence, from *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) to *Lee v. Weisman, supra*, has consistently taught that the Government has no business indoctrinating children regarding religious issues.

Conclusion

The Pledge of Allegiance with the words "under God" included in it is clearly an unconstitutional symbolic union of God and State which conveys an unmistakable impression of government endorsement of religion over non-religion. Additionally, as explained by this court in *Lee*, the state-ordered group recital of the Pledge places impressionable school-aged children in the untenable position of succumbing to peer pressure or facing certain ostracism. The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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